93-186

No. _____

Supreme Court, U.S.
FILED
AUG 3 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

MAURY PAGE KEMP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Mr. Kemp was denied a proper application of the Sentencing Guidelines because his check kite, which was the basis of his bank fraud conviction, was not treated as a fraudulently obtained loan for the purpose of calculating the Sentencing Guidelines.

2. Whether the court of appeals is able to determine "implicit findings" made by the district court in the place of actual findings that should have been made to support Sentencing Guideline calculations.

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PETITION FOR WRIT OF CERTIORARI

Maury Page Kemp, the Petitioner, by and through his attorneys of record, hereby petitions this Court to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. Freydenlund*,[1] No.

[1] The three appellants were Mr. Kemp, Donna Freydenlund, and Perry Pressley.

92-8157 (reported at 990 F.2d 822 (5th Cir. 1993)), entered on May 4, 1993, is reproduced herein at App. 1. That court denied rehearing as to codefendant Donna Freydenlund on June 8, 1993. The order denying rehearing is reproduced herein at App. 9.

STATEMENT OF JURISDICTION

Mr. Kemp seeks review of the judgment of the United States Court of Appeals entered on May 4, 1993. Although Mr. Kemp did not petition for rehearing, his codefendant Donna Freydenlund did. The court of appeals denied rehearing on June 8, 1993. This petition is timely filed within ninety days of the denial of the petition for rehearing, pursuant to Rule 13.4 of the Rules of the United States Supreme Court. Mr. Kemp seeks review by this Court pursuant to the jurisdiction granted by 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18, United States Code, § 1344 provides:

Whoever, knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the money, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false of fraudulent pretences, representation, or promises;

shall be fined not more than $1,000,000 or imprisoned more than 30 years or both.

SENTENCING GUIDELINE PROVISIONS INVOLVED

Section 2F1.1 of the United States Sentencing Guidelines provides in pertinent part:

Fraud and Deceit

(a) Base Offense Level 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	*Increase in Level*
. . .	
(K) More than $500,000 add	10
(L) More than $800,000 add	11
(M) More than $1,500,000 add	12
. . .	

Application Note 7(b) to § 2F1.1 of the United States Sentencing Guidelines provides in part:

(b) *Fraudulent Loan Application and Contract Procurement Cases*

In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets,

> the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan.

STATEMENT OF THE CASE

Maury Kemp, a previously successful and still well respected businessman, was convicted along with his two bookkeepers Perry Pressley and Donna Freydenlund of bank fraud, under 18 U.S.C. § 1344(1) and conspiracy to commit bank fraud under 18 U.S.C. § 371 (App. 1). The scheme which was the basis of the bank fraud was a check-kiting operation that was essentially undisputed by the parties at trial (App. 4).

The kite was operated between a bank in Texas and a bank in California in a standard fashion. Checks were continually deposited from one account to another, with no real money to support the balances in the accounts (App. 2). The balances were thus artificially inflated, and Mr. Kemp had the use of the banks' money during this time. Mr. Kemp's use of the banks' money was, of course, dependent on the banks' willingness to allow Mr. Kemp the use of uncollected funds.

The California bank made the decision to discontinue the practice of letting Mr. Kemp draw on uncollected funds, although the bank had been earning thousands of dollars each month that it charged as interest on Mr. Kemp's use of the uncollected funds. When this occurred, the Texas bank was stuck with approximately $1.5 million

in overdrafts (App. 2). At the time, the Texas bank had security in property owned by Mr. Kemp. Mr. Kemp then executed a promissory note giving full security to the Texas bank.

All of the bank officers testified that Mr. Kemp had gotten an unauthorized extension of credit. A first vice-president with the Texas bank testified that when the bank allows a check to be drawn on uncollected funds, it is technically, legally making a loan. The vice-president testified that although a bank officer should not make a loan in such a manner, he certainly could do it.

An account officer at the Texas bank during the time of the offense testified that a bank officer could authorize an ongoing loan to a customer by letting him use uncollected funds in his accounts. He testified that this would not be the normal procedure, and that he did not authorize such a loan to Maury Kemp. An executive vice-president at the Texas bank testified that paying on an overdraft or on uncollected funds is an "unorthodox way of making a loan," and an "informal extension of credit."

Finally, a vice-president at the California bank testified that he felt that his bank was making a loan to Mr. Kemp by letting him use uncollected funds. He testified that this was an unorthodox way of making a loan, and that he would not have allowed it had he known of the "check kite scheme."

In summary, all of the bank officers agreed that Mr. Kemp had duped them into extending him credit where they would not have otherwise done so.

Mr. Kemp's purpose in kiting funds was to keep his car dealerships open, and thus maintain their value while he tried to sell them to pull himself out of debt (App 2). Mr. Kemp testified that it was his belief that since he was going to pay the bank back, he was not "kiting" checks, but simply utilizing the float. Although the jury clearly found Mr. Kemp's actions to be illegal, this finding was not inconsistent with Mr. Kemp's testimony. The Government never alleged, and there was no evidence, that Mr. Kemp intended to steal the bank's funds. Rather, the undisputed evidence was that Mr. Kemp used the bank's funds through an extension of credit made with their permission, but based on the false representation of the inflated balances in his accounts.

In a Sentencing Memorandum filed with the district court, Mr. Kemp noted that the bank estimated its loss from the overdraft at $500,000 to $600,000. Mr. Kemp argued that the loss was actually zero, because the collateral given to the bank would, once sold, make the bank whole. The district court did not use Mr. Kemp's or the bank's estimate of loss, but summarily overruled Mr. Kemp's objection, using instead the face value of the extension of credit. The court of appeals upheld this ruling, holding that a check kite should not be treated as a fraudulently obtained loan under the guidelines, and finding that the district court "implicitly found" that the actual loss was the face value of the overdrafts.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. MR. KEMP WAS DENIED A PROPER APPLICATION OF THE SENTENCING GUIDELINES BECAUSE HIS CHECK KITE, WHICH WAS THE BASIS OF HIS BANK FRAUD CONVICTION, WAS NOT TREATED AS A FRAUDULENTLY OBTAINED LOAN FOR THE PURPOSE OF CALCULATING THE SENTENCING GUIDELINES.

The determination of the amount of loss in a bank fraud case is the most important factor in calculating the offense level under the Sentencing Guidelines. The base offense level for a conviction under 18 U.S.C. § 1344 is six, pursuant to U.S.S.G. § 2F1.1(a).[2] Specific offense characteristics increase the base offense level according to the amount of loss, which is to be determined by the table in § 2F1.1(b)(1). The total offense level is determined after consideration of the other specific offense characteristics in § 2F1.1, as well as the adjustments in Chapter Three of the Sentencing Guidelines.

Mr. Kemp was denied the proper application of the Sentencing Guidelines because the face value of the overdrafts was used, rather than the actual loss to the bank. In Mr. Kemp's case, an upward adjustment of twelve was added to the base offense of six, based on the calculated loss of $1,552,430.99, the amount of the overdrafts at the Texas bank. Various other upward and downward adjustments were made, and Mr. Kemp was sentenced to a term of imprisonment of forty months, restitution in the

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[2] The offense level for conspiracy is determined by reference to the substantive offense, pursuant to U.S.S.G. § 2X1.1(a).

amount of $1,552,430.99, and a period of supervised release.

The amount of loss in a fraud case is not so simple to determine as in a theft case, because it is not always clear what property was the subject of the fraud. In the case of theft, the amount of money taken is the measure of loss regardless of subsequent repayment, because it is clear the defendant intended to permanently deprive his victim of that amount. In a check kite, the thing of value being taken from the bank is a loan of funds. Essentially, the check-kiter is forcing the bank, by his scheme, to loan him money, without making a loan application and getting the approval of the bank.

Mr. Kemp urged the district court and the court of appeals that since his crime was that of fraudulently obtaining a loan from the bank (through the kite), he was entitled to be sentenced under the applicable guidelines. The Sentencing Guidelines specifically address fraudulent loan cases in Application Note 7(b) to § 2F1.1, and guideline commentary is binding on the court in interpreting a guideline, *Stinson v. United States*, ___ U.S. ___, 113 S.Ct. 1913, 1917-18 (1993). Although Note 7(b) does not discuss a loan fraudulently obtained through a check kite, the note directs the court as to different ways of determining loss. Where the loan is fraudulent due to an overstating of assets, the loss will be:

> . . . the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan.

The courts of appeals that have addressed this issue are not in agreement as to the proper measure of loss in the case of a fraudulently gotten loan. Two courts of appeals have held that the face value of the fraudulently gotten loans is the appropriate measure of loss under § 2F1.1. *See, United States v. Brach*, 942 F.2d 141, 143 (2nd Cir. 1991); *United States v. Johnson*, 908 F.2d 396, 398 (8th Cir. 1990).

The better view, and one that is more in keeping with the commentary to the guidelines, has been adopted by the Third, Fourth and Tenth Circuit Courts of Appeals. Those courts have held that the sentencing court, rather than simply taking the face value of the loan as the "loss," must do a deeper analysis to determine actual, probable or intended loss. *See, United States v. Kopp*, 951 F.2d 521, 529 (3rd Cir. 1991); *United States v. Rothberg*, 954 F.2d 217 (4th Cir. 1992); *United States v. Haddock*, 956 F.2d 1534 (10th Cir. 1992).

The court of appeals in the present case did not take a position in this split in the circuits, finding instead that a check kite should not be treated as a fraudulently obtained loan (App. 6). The court found:

> As the government points out, the bank at least voiced its approval of the credit extended on a fraudulently obtained loan, while a check kite is done surreptitiously precisely because the bank would under no circumstances have lent to the kiter. The bank also voluntarily places a limit on its risk when it lends money, but it is at the mercy of the check kiter for the amount of loss he may cause.

App. 6-7.

The court's reasoning is flawed. Approval is not given for a fraudulently obtained loan any more than it is for a check kite. In the case of a fraudulently obtained loan, the bank approves an extension of credit, but it is not approving all of the terms of the loan because it has been deceived as to some of the underlying facts. Similarly, here the banks approved the extension of credit, but did not know all of the underlying circumstances, in particular the source of repayment.

Neither does the bank know the limits of its risk in the case of a fraudulently gotten loan any more than in the case of a check kite. In the case of a properly obtained loan, the bank knowingly and voluntarily puts a limit on its risk. However, where fraud is involved, the bank does not know the limits of its risk because it has been deceived about some relevant facts, such as the value of the collateral, the true recipients of the loan proceeds or the source of repayment. *See, United States v. Saks*, 964 F.2d 1514, 1519 (5th Cir. 1992) (misrepresentation of the true recipients of the loan proceeds prosecuted under § 1344). Furthermore, the banks in the present case knew exactly how much money was at risk because the negative balances in the accounts and the amount of the "float" were reported on the customer analysis statements of the bank.

The check kite here was not analogous to a fraudulently obtained loan, it *was* a fraudulently obtained loan.[3]

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[3] There will be some instances of check kiting where the kiter intends to permanently deprive the bank of its funds. This clearly was not the case here, as the court of appeals recognized that "check kiting defrauds the bank by temporarily placing the bank's funds at the disposal of the account holder." App. 4.

As such, Mr. Kemp was entitled to the application of the Sentencing Guidelines concerning fraudulently obtained loans.

2. THE COURT OF APPEALS CANNOT DETERMINE "IMPLICIT FINDINGS" MADE BY THE DISTRICT COURT IN THE PLACE OF ACTUAL FINDINGS THAT SHOULD HAVE BEEN MADE TO SUPPORT SENTENCING GUIDELINE CALCULATIONS.

The court of appeals did not base its ruling on the finding that a check kite is not a fraudulently obtained loan. Rather, the court held that even if the district court should have determined actual loss pursuant to Application Note 7, as Mr. Kemp suggests, there were "implicit" findings that would support the district court's finding of loss (App. 7).

The court of appeals cannot determine the lower court's implicit findings, or whether those findings were clearly erroneous, without knowing what method of calculation that court used.

Essentially, what the court of appeals pronounces in its holding, is that if there is a conceivable method by which the lower court could have come up with the figure it did, the court of appeals can assume it used the proper methodology, despite the absence of findings. Where the method of loss calculation is hotly disputed, and the record so strongly suggests that the court used one method (here the face value of the overdrafts), it is pure creativity on the part of the court of appeals to suggest the lower court made implicit factual findings under another method of loss calculation.

Factual findings can be upheld only so long as they are the result of a correct application of the guidelines. *United States v. Mitchell*, 964 F.2d 454, 458 (5th Cir. 1992) (citing *United States v. Rivera*, 898 F.2d 442, 445 (5th Cir. 1990)). It follows that factual findings cannot be upheld if they are merely intuited by the court of appeals in the face of what appears to be an incorrect application of the guidelines.

An analogous situation under the Sentencing Guidelines would be where the scope of a drug conspiracy must be determined as to each defendant. It is well established that the sentencing court is required to find the extent to which a larger drug enterprise is reasonably foreseeable to each defendant. *United States v. Mitchell*, 964 F.2d at 458. A failure to make those findings is reversible error. *Id.*

The Tenth Circuit would certainly require reversal of the district court's sentence. In *United States v. Gallegos*, 975 F.2d 710 (10th Cir. 1992), the defendant fraudulently obtained a $1.25 million line of credit. Approximately $211,000 was repaid prior to sentencing. In a related civil case, the bank settled its claim against the defendant for a little more than an additional $336,000 and the defendant dismissed his counterclaim. *Id.* at 712. The district court used the entire $1.25 million as the amount of loss for sentencing purposes, but did not specify whether that represented the actual or intended loss. *Id.* at 713.

The Tenth Circuit held that the case had to be remanded for a determination of whether the proper measure of loss was intended loss or actual loss. *Id.* The court further instructed that if actual loss were to be the

measure, the district court "should consider the likelihood of repayment of the settlement amount and sentence accordingly." *Id.* The court reasoned that it would be "incongruous" to find that the actual loss was greater than the amount the bank sought to collect from the defendant. *Id.*

Similarly here, the district court did not disclose whether the amount of the loss it used represented intended or actual loss. It is unlikely that the court felt it was intended loss based on the court's remark that the loss the defendants wanted was zero. As in *Gallegos*, the amount of money received by Mr. Kemp was the entire amount of the extension of credit, yet it is clear from the record that the entire loan amount was not the intended loss or the actual loss.

Also as in *Gallegos*, the district court failed to take into consideration the likelihood of repayment and the value of collateral used to secure the amount owed. During trial, Mr. Kemp testified that the Texas bank had substantial collateral for the money owed.

The final similarity between the present case and *Gallegos* is that in both instances the bank/victim made its own estimate of the loss, which was ignored by the court.

In the present case, the court of appeals held that, "Without hearing further explanation, the court was not required to credit the bank's lower estimate of its loss to a third party." (App. 7) However, the party seeking the upward adjustment bears the burden of proof to present credible evidence by a preponderance of the evidence to support the upward adjustment. *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990).

The court of appeals recognized that the victims' estimate of loss was not disputed, but held that Mr. Kemp would be required to present *more* evidence than that to prevent the upward adjustment. In effect, it supposed that there was some evidence other than the bank's estimate of loss. A district court must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidleines. *United States v. Wilson*, 993 F.2d 214, 218 (11th Cir. 1993) (citing *United States v. Patrick*, 983 F.2d 206, 209-11 (11th Cir. 1993)).

The guidelines were "designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain." S.Rep. No. 225, 98th Cong., 2d Sess. 65, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3248. If the courts of appeals can fish for implied findings in a lower court's decision, the only certainty in sentencing will be the sureness that the sentence will be affirmed on appeal. Indeterminate sentencing will return if the lower courts can sentence without reference to the appropriate guidelines, and leave it to the court of appeals to discover the implied finding that would legitimize the sentence.

CONCLUSION

Under the law of other circuit courts of appeals, this case would have been remanded for a resentencing with findings to be made concerning the amount of loss. The district court used the face value of the fraudulently obtained extension of credit without further analysis. The

court of appeals improperly presumed implied findings by the lower court to validate this improper sentencing procedure.

The Tenth Circuit has found that:

> Mechanical application of the theft guideline in fraud cases would frustrate the legislative purpose of the guidelines and contravene the specific language of the Commission.

Kopp, 951 F.2d at 529.

For all of the foregoing reasons, the judgment of the court of appeals should be reversed, and Mr. Kemp's case should be remanded to the district court for resentencing.

Respectfully submitted,

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August 1993

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8157

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONNA FRYDENLUND,
PERRY PRESSLEY and MAURY PAGE KEMP,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

(Filed May 04, 1993)

Before POLITZ, Chief Judge, GOLDBERG, and JONES, Circuit Judges. EDITH H. JONES, Circuit Judge:

Appellants Maury Kemp, Perry Pressley, and Donna Frydenlund were convicted of bank fraud, in violation of 18 U.S.C. § 1344(1), and of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371. All three were sentenced to terms of imprisonment and were ordered to pay restitution of approximately $1.5 million. Kemp and Pressley challenge their sentences. Pressley and Frydenlund challenge their convictions. Finding no reversible error, we affirm.

I.

In late 1989, Kemp owned three car dealerships in California. Frydenlund served as comptroller and general manager of those businesses. Pressley, based in El Paso, was the comptroller for Kemp Group, a holding company for Kemp's business entities, including the three California car dealerships. Pressley was Kemp Group's only employee and prepared financial statements, signed checks, and ran errands for Kemp.

Kemp Group had a checking account at MBank in El Paso. The three California dealerships had accounts at First Interstate Bank in California. As the businesses began to fail in late 1989 and 1990, Kemp devised a check-kiting scheme to keep them running until he could sell them as ongoing businesses. He instructed Pressley to send blank Kemp Group checks to California, which would then be filled out by Frydenlund in the amount needed to keep the businesses' accounts current. In return, Frydenlund would sent back checks drawn on the First Interstate accounts to Pressley in El Paso to cover the amounts of the Kemp Group checks. Pressley would then deposit these checks in the MBank account. Over the next few months, hundreds of checks traveled back and forth in this manner between Kemp Group and the California dealerships.

In January 1991 First Interstate uncovered the scheme and informed MBank that it was returning 37 checks totalling more than $1.5 million. MBank posted the checks as overdrafts. A jury convicted the three defendants of bank fraud and of conspiracy to commit bank fraud. The trial judge gave them prison sentences and

ordered them to pay restitution of approximately $1.5 million.

II.

Appellants Pressley and Frydenlund challenge the sufficiency of the evidence to convict them. In such challenges, the court must decide whether a rational jury could find evidence that establishes guilt beyond a reasonable doubt. *United States v. Espinoza-Seanez*, 862 F.2d 526, 536 (5th Cir. 1988). Not every reasonable hypothesis of innocence need be excluded by the evidence. *Id.* And all reasonable inferences and credibility choices must be viewed in the light most favorable to the government. *Id.*

The jury in this case could reasonably conclude from the evidence presented at trial that both Pressley and Frydenlund knowingly participated in a scheme to defraud MBank and FIB. Both Pressley and Frydenlund admit full knowledge of the scheme. They also admit that they acted under Kemp's orders to carry the scheme forward. They argue in defense only that they lacked the specific intent to deceive or cheat the bank. These arguments are unpersuasive.

Check kiting is a scheme "designed to separate the bank from its money by tricking it into inflating bank balances and honoring checks drawn against accounts with insufficient funds." *United States v. Doherty*, 969 F.2d 425, 428 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 607, 121 L.Ed.2d 542 (1992); *see Williams v. United States*, 458 U.S. 279, 281 n.1, 102 S. Ct. 3088, 3089 n.1, 73 L.Ed.2d 767 (1982). Section 1344(1) does not require a specific intent to permanently deprive the bank of its funds. It is sufficient

to knowingly participate in a scheme to trick the bank into inflating bank balances by kiting checks between two or more banks. The bare act of check kiting defrauds the bank by temporarily placing the bank's funds at the disposal of the account holder.[1]

Notwithstanding Pressley's and Frydenlund's declared intent that the banks not be permanently deprived of funds, these convictions must be sustained. Both admitted full knowledge of the check-kiting scheme. They knew they were participating in check kiting, and they knew that their activities would have the effect of artificially inflating the balances of Kemp's accounts in MBank and FIB. In extenuation, these appellants point out that they were following Kemp's orders. Because he was a wealthy, established businessman who had recently injected $500,000 additional capital into the California dealerships, they had every reason to believe he did not plan to deprive the banks of their money or to inflict losses on them. Kemp, to his credit, accepted full personal responsibility for the scheme and testified in his employees' behalf. There is pathos in Kemp's and the appellants' positions, but it cannot overcome the jury verdict finding them guilty under § 1344(1).

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[1] At least six Circuits have expressly held that bare check-kiting schemes fall within the scope of section 1344(1). *See Doherty*, 969 F.2d at 428-29; *United States v. Stone*, 954 F.2d 1187, 1189-91 (6th Cir. 1992); *United States v. Fontana*, 948 F.2d 796, 802 (1st Cir. 1991); *United States v. Celesia*, 945 F.2d 756, 758-59 (4th Cir. 1991); *United States v. Schwartz*, 899 F.2d 243, 246-47 (3d Cir.), *cert. denied*, 498 U.S. 901, 111 S. Ct. 259, 112 L.Ed.2d 217 (1990); *United States v. Bonnett*, 877 F.2d 1450, 1454-56 (10th Cir. 1989).

There was also ample evidence that the defendants took part in a conspiracy to keep the check kite operating for months. The defendants acted in concert with Kemp to facilitate the exchange of hundreds of checks. To find a conspiracy violation under 18 U.S.C. § 371, a jury need only find an agreement between two or more persons to violate the law and an overt act by one member of the conspiracy in furtherance of the conspiracy. A specific agreement need not be shown, but may be inferred from concert of action. *See United States v. Magee*, 821 F.2d 234, 239 (5th Cir. 1987). Here, there was clearly a concert of action between Kemp, on the one hand, and his financial managers, on the other.

III.

Appellants Kemp and Pressley argue that the district court erred in calculating their base offense level under the sentencing guidelines. Persons convicted of check kiting are sentenced under section 2F1.1 of the Guidelines. *See Doherty*, 969 F.2d at 430; *United States v. Haddock*, 956 F.2d 1534, 1554 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 88, 121 L.Ed.2d 50 (1992); *United States v. Carey*, 895 F.2d 318, 323 (7th Cir. 1990); *United States v. Bolden*, 889 F.2d 1336, 1339 (4th Cir. 1989). The ultimate overdraft in this case was $1,552,430.99, and the district court used that amount for the purpose of calculating the appropriate upward adjustment under section 2F1.1(b)(1).

The appellants argue that it was inappropriate to use the total amount of the overdraft, because after the dust settled MBank's loss was much less than the amount of the overdraft. The defendants believe that the real loss to

MBank is zero, because Kemp executed a promissory note to MBank for the full amount of the overdraft, secured by a second lien on the California dealership properties, and because Kemp will eventually pay back MBank when he sells the dealerships. According to the appellants, because MBank's losses, if any, will be lower than the amount of the overdraft at the time the scheme was uncovered, the court erred by sentencing them according to the higher, "inflated" number.

Appellants characterize their argument as directed not at the district court's finding of MBank's actual loss, which is shielded by the clearly erroneous rule on appeal,[2] but at its legal misapplication of the guidelines, a matter we review *de novo*.[3] The appellants contend that check kiting should be treated like a fraudulently obtained loan, for which an application note accompanying § 2F1.1 specifies that the victim's (*i.e.*, the bank's) loss "is the amount of the loan not repaid at the time the offense is discovered," reduced by whatever the bank might recover from collateral pledged to secure the loan. U.S.S.G. § 2F1.1 appl. note 7(b).

We reject this argument for two reasons. First, check kiting is not more equivalent to a fraudulent loan transaction than to simple theft. As the government points out, the bank at least voiced its approval of the credit extended on a fraudulently obtained loan, while a check kite is done surreptitiously precisely because the bank

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[2] *United States v. Rodriguez*, 897 F.2d 1324, 1325 (5th Cir.), *cert. denied*, 498 U.S. 857, 111 S. Ct. 158, 112 L.Ed.2d 124 (1990).

[3] *United States v. Ruff*, 984 F.2d 635, 639 (5th Cir. 1993).

would under no circumstances have lent to the kiter. The bank also voluntarily places a limit on its risk when it lends money, but it is at the mercy of the check kiter for the amount of loss he may cause.

Second, no matter which part of § 2F1.1 is applied, the sentencing standard depends upon the bank's actual loss. Kemp did not disagree that the out-of-pocket loss to MBank was $1.5 million: he agreed to repay that amount. The only question here is whether his agreement, his good intentions, and the second lien on the California dealerships reduced that actual loss.[4] The district court implicitly found they did not, and this finding is not clearly erroneous. At the time of sentencing, Kemp's financial empire was in trouble, the appraisals of the dealerships could be seen as optimistic, the sales proceeds for one were tied up in litigation, and no payments had been made to reduce the $1.5 million loss. Without hearing further explanation, the court was not required to credit the bank's lower estimate of its loss to a third party. Thus, although it is possible that the actual loss may in some cases be less than the overdraft when the kite is discovered, Kemp did not persuade the court of that in his case.

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[4] The fraudulent loan cases cited by Kemp are distinguishable on the facts, because in each of those, the "actual loss" was subject to reduction by actual payments made on the loans before default and valuable collateral given for those loans. *See United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991); *United States v. Rothberg*, 954 F.2d 217 (4th Cir. 1992); *Haddock*, 956 F.2d at 1554-55.

The Seventh Circuit has rejected a similar argument in *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990). In *Carey*, the defendant's check-kiting scheme left a $220,000 deficit in his account when the scheme was finally exposed. The district court granted Carey a downward departure because he had restored all but $20,000 of the money owed to the bank. The Seventh Circuit reversed, holding that restitution did not alleviate the fact that he had defrauded the bank of $220,000 before his artifice was discovered. The entire loss was due directly to Carey's actions, and his restitution of the lion's share of the money, though commendable, did not decrease the seriousness of the crime he had committed. The district court in this case did not erroneously apply the Guidelines to determine the appellants' sentences.[5]

CONCLUSION

For the foregoing reasons, the judgment and sentences of each appellant are **AFFIRMED.**

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[5] The government suggests by innuendo that the sum total of the defendants' fraud approached $47,000,000, the total of all of the checks used in the kiting scheme. That figure grossly misstates the nature of the scheme. Each check worked only a temporary float. A check-kiting scheme involving only two checks would inflate the account balances for only a very short time, perhaps only a few days. In a more involved scheme, each check replaces the previous checks, merely sustaining the float, rather than adding to the amount floated. *See United States v. Deutsch*, ___ F.2d ___, ___, 1993 W.L. 32685, at *7 (2d Cir. Feb. 11, 1993).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8157

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONNA FRYDENLUND,

Defendant-Appellant.

Appeal from the United States District Court for the Western District Of Texas

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ON PETITION FOR REHEARING

(June 8, 1993)

Before POLITZ, Chief Judge, GOLDBERG and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE
COURT:

/s/ Edith H. Jones
United States Circuit
Judge